IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 129 OF 1995

International Airports Authority]
of India, Santacruz Airport]
Bombay 400 099]Appellants

versus

Shri Bhimrao Chandappa Dasar,]
Adult, Indian Inhabitant of Bombay]
residing at Opp: Green Villa,]
Govind Nagar, Asalfa Village]
Ghatkopar (West), Bombay 400 084]Respondents

Mr. R. R.Salvi i/b. M/s. M. V. Kini & Co. for the Appellants.

Mr. P. K. Dhakephalkar with Karale for the Respondents.

CORAM : D. G. DESHPANDE,J.

DATE : 28TH APRIL,2005

ORAL JUDGMENT :

1. Heard counsel for the appellants and the Respondents.

2. Respondents are original defendants in the suit filed by the plaintiffs - Respondents for

permanent injunction restraining the defendants from disturbing its exclusive possession of the suit property. The suit of the plaintiff was decreed by the trial court and therefore the Appellants International Airports Authority of India has filed their appeal. It was the case of the plaintiff that he was in exclusive, use, occupation of a total area of 7840.35 sq. meters from different survey numbers i.e. 158.75 sq. meters from CTS No. 289, 560 sq. meters from CTS No. 270 and 6221.06 sq. meters from CTS No.271 lying and situate at Opposite Green Villa, Village Asalfa, Ghatkopar (West), Bombay. On this vast land there is only structure of 20 x 60 sq.ft. i.e. called "the suit premises". The plaintiff was required to file this suit because the defendants started construction of boundary wall over this area and this was according to the plaintiff disturbance of possession and therefore he filed the suit.

3. The defence of the defendants was that award dated 31.10.1959 came to be passed by the SLAO, Bombay Suburban District, Bombay, of each plot of land bearing Survey No.2, Hissa No.14 i.e. CTS No. 270 admeasuring 329 sq. meters, Survey No.13 CTS No.271 admeasuring 1543 sq. meters out of the total area and Hissa No.15 CTS 289 admeasuring 885 sq. meters. After the acquisition, the SLAO was put in

actual possession of the land by the original owners. Then these lands were handed over to the Special Aviation Department from whom the defendants - appellants got possession somewhere in 1971. Their name was incorporated in the revenue record in 1988. Various development activities were under way for upgrading the facility at Bombay Airport and for protection of the existing installation and it was found necessary to have a compound wall around the suit land. Therefore, according to them, the case of the plaintiff was totally false and bogus.

4. It is clear from the nature of the suit claim made by the plaintiff that he wants to resist or oppose attempts by the appellants - a statutory authority from constructing a compound wall around the suit property when compound wall is necessary for protection of the installation existing, the trial court however decreed the suit. Admittedly the plaintiff is not the owner of the suit property. What it claims in the plaint is that his father Chandappa Dasar was appointed as watchman to look after the property right from 1957 . He further states that since 1967 his father was in exclusive use, occupation of the suit property as a watchman and after the death of his father the plaintiff took charge of the plot of land and by the General Power of Attorney and Agreement of sale the owners of the

property put the plaintiff in exclusive, use, occupation and possession as owner of the suit land. The Plaintiff also claims adverse possession. Obviously these two pleas are contradictory. The documents relied upon by the plaintiff for possession and is taken into consideration by the trial court are ration card, assessment bill, water bill etc. Certain correspondence with the BMC and City Survey Office.

5. It is pertinent to note that the trial court did not frame any issue regarding title because the plaintiff had cleverly avoided to seek declaration of any title either as owner or by virtue of adverse possession. Therefore, this is a suit where the plaintiff has succeeded in getting permanent injunction against the appellants a statutory authority without seeking declaration of his right in the property. So far as possession is concerned, there are two aspects of the matter possession of structure i.e. suit structure which is 20 x 60 sq. ft. and possession of vacant land. The trial court accepted the fact that the plaintiff was not the owner of the property because the land acquisition proceedings were against the real owners and not against the plaintiff. The SLAO was put in possession in 1959 during the said acquisition proceedings.

6. The Plaintiff produced assessment bill collectively Exhibit ’M’ issued by the BMC for the year 1980-81 in the name of plaintiff’s father Chandappa and what is shown is C.I. Shed in N.H. society at Village Asalfa. This document is of the year 1980-81. Then there is Exhibit ’L’ ration card which shows name of the plaintiff as staying with his family. These two documents were accepted by the trial court as a proof of the plaintiff residing in the said suit structure.

7. The trial court found that there was no positive evidence in the form of 7/12 extract or property extract showing the plaintiff’s name or his father’s name in the Government record in respect of the suit land. It may be that the plaintiff was in possession of the suit structure when he filed the suit but the question is of the remaining vast vacant land and it appears from the judgment of the trial court that the trial court failed to take into consideration the distinguishing factor in respect of both the claims of the plaintiff, namely possession of structure and possession of vacant land. It cannot be presumed that merely because the plaintiff is in possession of structure admeasuring 20 x 60 sq. ft. he should be held to be in possession of the entire land admeasuring about 7000

sq. meters and so. In fact heavy burden was there on the plaintiff as to the actual vacant physical possession of the land and looking to the land acquisition proceedings and the fact of appellants being placed in possession through the Special Aviation Department, did not appear to have weighed with the trial Judge.

8. So far as possession of vacant land is concerned, the trial court relied upon Exhibit 'P' which was a letter sent by Enquiry officer of the DILR. It is a notice issued under Section 37(2) of Land Revenue Code about construction made by the plaintiff. Then Exhibit 'Q' is a certified copy of Gut book entry showing possession of Survey No.22, Hissa Nos. 13, 14 and 15. Then Exhibit 'DD' application made by the plaintiff to the Additional District Dy. Collector, Bombay Suburban, Andheri. These applications were made under Section 44(1) of Maharashtra Land Revenue Code for converting these lands to NA use. Then Exhibits 'U', "W" and "EE" are the letters received by the plaintiff in 1980 - 1981, namely, show cause notices for unauthorised NA use of the lands, and Exhibit "CC" the order of the Additional District Dy. Collector, requiring the plaintiff to pay penalty for the unauthorised use of the suit land for NA purpose.

9. Apart from this, the trial court also considered the letter of the plaintiff dated 29.7.1986 at Exhibit ’FF’ by which the plaintiff asked the DILR to survey the land. These documents and the subsequent survey made has been taken by the court as proof of possession over the vacant piece of land by the Plaintiff.

10. As already stated by me, distinction has to be made in the case of the plaintiff regarding possession of his structure. The only structure admeasuring 20 x 60 sq. ft. to which there is a reference in the plaint and the vacant land i.e. the suit land. The plaintiff has misused two terms "suit structure" and "suit land" and therefore proof of possession of the suit premises cannot be treated as proof of possession of the suit land unless the evidence of the plaintiff is specific in that regard.

11. As against the evidence of the plaintiff, the appellants also adduced evidence but all that evidence was disregard by the court on the ground that there was no documentary evidence to show defendants possession or the possession of Civil Aviation Department or of the SLAO. In this regard appellants examined one Rajendra K. Hiremath as D.W. 1 he was a surveyor. He has stated that he

was visiting the suit property since 1982 during his duty time. Suit property was acquired in the year 1959. Earlier the suit lands were with the Civil Aviation Department but in 1972 they were transferred to the Appellants. He has produced an Award of 1959 it is dated 3.10.1959 at Exhibit ’1’. He also deposed about the change survey numbers of the suit land. He produced property cards in which the land was shown to be in possession of the appellant, it is Exhibit ’3’ collectively. Then he has produced 7/12 extract in respect of the suit property. He also produced Gazette Notification which was Exhibit ’5’ which shows the lands were acquired by the Government and by the Appellants for fixing of navigation aids for safe landing of their aircraft. He had stated that in 1991 he has personally visited the suit land and demarcated it, cross examination of this witness D.W. 1 shows that not a single question is put to him by the Advocate for the Plaintiff about the right which the plaintiff is claiming by virtue of adverse possession. At the end of his cross examination what was suggested to him was that this land was never acquired by the Government and Government never took possession. In absence of cross examination of the important witness of the defendants - appellants and not putting him any question regarding the case of the plaintiff or

assertion of right by the plaintiff by adverse possession or regarding the activities done by the plaintiff to assert his possession, is a strong circumstance that in fact weakens the case of the plaintiff, but this aspect of the matter and fact has not been considered by the trial court at all. Therefore practically there is no challenge to to the evidence of this D.W. 1 much less a successful challenge by the plaintiff.

12. Thereafter appellants - defendants examined the land acquisition officer as D.W. 2 Vasantlal Shah. He has produced the agreement between the Collector, BSD and the owner of the suit land, those were exhibited as Exhibits 9, 10 and 11. From the cross examination of this witness, it is clear that on the plan Exhibit 6-A it was written "*measured in my presence*" and this was done by the City Survey Officer. Suggestions put to him were that the land was not at all acquired by the Government. Obviously those suggestions were denied.

13. D.W. 1 Hiremath in evidence and particularly in cross -examination has stated that in 1983 the plaintiff started encroaching on the suit land, therefore wire fencing was put up and then when again plaintiff started his encroachment in 1991 the decided to construct the wall. He has

also given his explanation as to why nobody was present when the notice was given by the DILR. This witness has also produced possession receipt.

14. From the evidence of these two witnesses and the documents produced by them, it will be clear that this land was acquired, as stated by the Appellants, they got possession along with possession receipt, they exercised their right in 1983 by erecting wire fencing, to which evidence there is no challenge whatsoever. Therefore, this is a case where the appellants is basing its title and possession of Government record and acquisition proceedings and the agreement between the owner and the acquiring body accompanied by documents showing that they were placed in possession. Whereas the plaintiff who has no title to the property is claiming possession not only of the solitary structure but also on the vast surrounding land. There is absolutely no cross-examination of the witnesses of the defendants - appellants regarding plaintiff’s case and his assertion of right of possession in respect of the vacant land, as observed by me.

15. In fact for all these reasons the court should have rejected the claim and contention of the plaintiff at least so far as it related to

possession of vacant land. It is pertinent to note that according to the plaintiff when the suit was filed there was only one structure but in his evidence the plaintiff improved his case and contended that on the suit land there were other structures and there were 10 structures built by him and occupied by his tenants.

16. It is therefore a suit where the plaintiff obtained ad interim order in respect of his solitary structure on the basis of apprehension and then improved his case at the stage of evidence about 10 structures or many more structures, then there is no explanation why the plaintiff suppressed this important fact of existence of many other structures on the suit property when the plaint was filed. There is also no explanation why the plaint is silent on this particular material aspect. Obvious reason is that if the plaintiff has given particulars of those structures with names of occupants, then burden would have been on the plaintiff to prove as to when and how he constructed those structures, from where he got the money, whether he had obtained permission of Bombay Municipal Corporation for that purpose, how and when he inducted tenants, what was the rent he was recovering from those tenants, all these acts if alleged and proved would have helped the plaintiff

in proving this factor of possession over the remaining vacant land or the suit land. But since the plaintiff did not state anything about these aspects of the matter in his plaint, obvious reason is that he found it difficult to substantiate his claim of possession of the entire land of 7000 or 8000 sq. yards or sq. meters. This is also a circumstance which was not at all considered by the trial court regarding the area of the suit land and also the plaintiff has no personal knowledge because he has never measured the land. He has stated in his evidence that on the basis of map he came to know as to what was actual area of the particular survey number. If the plaintiff was asserting continuous and long possession then for want of knowledge as to the actual area, strong circumstance is going against him. Regarding structure also he admitted on page 87 of the paper book that he came to know about the particular structure was in a particular survey number on the basis of the survey report. Therefore, this is a case where factually the plaintiff does not know the survey numbers in his possession, the area of the property in his possession, and wants the court to believe that he was exerting his right on the basis of possession. Further in his evidence he has admitted that in 1957 the entire suit land was vacant and it was a jungle. If this is so then heavy burden was upon the

plaintiff to show how and when he cut the jungle, with whose permission that was done, and how he started using the vacant land and what was the manner in which the vacant land was being used by him. The plaint and the evidence is silent on this material aspects of the case. Even this aspect is lost sight of by the trial court. Therefore, impugned judgment shows that the plaintiff's evidence of possession of vacant land is accepted without sound reasons and evidence of possession of the appellants is rejected without strong, convincing reasons. In fact this was the case where for suppression of material facts, as stated above, the court should have drawn adverse inference against the plaintiff. The Court also failed to see that under the garb of injunction the plaintiff was trying to take as much land as possible in his possession. The erection of wire fencing by the appellants in 1983 is a clear indication of exercising their right of possession but the court committed an error in coming to the conclusion that there were no documentary evidence to show appellants possession on the suit land. The possession receipt and the agreements which are brought on record by the appellants, were strong and sufficient enough to hold that it was the appellants who were in possession atleast of the vacant land.

17. Therefore, in the circumstances this appeal is required to be allowed partly. It may be and the plaintiff has proved that he was in possession of the structure admeasuring 20 x 60 sq. ft. and the only structure on the suit land and therefore his possession is required to be protected till due process of law is followed or till action under the Public Premises Eviction Act. There cannot be a blanket order of injunction awarded by the court in respect of other strip of land and the appellants - defendants cannot be prevented from erecting the compound wall around their property. Therefore, I pass the following order :

ORDER

. The Appeal is partly allowed.

. Judgment and decree is modified. The Plaintiff- Respondent will be entitled to permanent injunction against the appellants - Defendants only in respect of the suit structure admeasuring 20 x 60 sq. ft and that too till due process of law is followed by the appellants under any of the Acts including Public Premises Eviction Act. There will be no injunction against the defendants - appellants in erecting the compound wall around their property

but the compound wall shall not touch the plaintiff's suit structure and will not prevent entry of the plaintiff in the suit structure. No order as to costs.

28.04.2005 (D.G. DESHPANDE, J.)